

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the:

Appeal from Official Rulings #167 and #168,
Los Alamitos Quarter Horse Racing
Association, dated September 28, 2001

LAURIE BURNETT-NUTTER,

Appellant.

Case No. SAC 01-052

OAH No. L2002030561

PROPOSED DECISION

This matter came on regularly for hearing on April 3, 2002 at Los Angeles, California before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Appellant Laurie Burnett-Nutter was represented by Alan D. Irvin and Robert Gruntz, attorneys at law. The California Horse Racing Board was represented by Deputy Attorney General Mark R. Beckington.

Documentary evidence and oral and written argument were presented. The record remained open for filing of additional exhibits from the underlying Stewards' hearing and for further briefing. The following additional materials were received and marked for identification:

a. A two-page document titled "Governing Procedures for Hearing Before Board of Stewards," added to CHRB Exhibit 1;

b. Data Packet for Procaine, Sample No. L20253, by Truesdail Laboratories, CHRB Exhibit 3;

c. Transcript of Proceedings before the Board of Stewards, July 27, 2001, CHRB Exhibit 11;

d. Transcript of Proceedings before the Board of Stewards, August 3, 2001, CHRB Exhibit 12;

e. Transcript of Proceedings before the Board of Stewards, August 10, 2001, CHRB Exhibit 13;

f. Transcript of Proceedings before the Board of Stewards, August 16, 2001, CHRB Exhibit 14;

g. Closing Brief of CHRB (to the Board of Stewards), CHRB Exhibit 16;

h. Reply Brief of CHRB in Support of Decision of Board of Stewards, dated June 11, 2002, CHRB Exhibit 17;

i. Letter from Alan D. Irwin dated July 18, 2001 to Board of Stewards and CHRB, Appellant Exhibit 1;

j. Letter from Mark R. Beckington dated July 23, 2001 to Alan D. Irwin, Appellant Exhibit 2;

k. Report by Dr. Cynthia Kollias-Baker and 3 attached articles, Appellant Exhibit 3;

l. Certificate of Registration for horse “You Scare Me,” Appellant Exhibit 4;

m. CHRB memo dated July 10, 1997 to “Horse Identifiers,” Appellant Exhibit 5;

n. Closing Argument of Respondent (to the Board of Stewards), Appellant Exhibit 7; and

o. Appellant’s Closing Brief, dated May 25, 2002, Appellant Exhibit 8.

The matter was submitted for decision as of June 11, 2002.

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. On February 4, 2001, the horse “You Scare Me,” trained by Appellant, finished in second place in the ninth race at Los Alamitos Race Track. The horse’s urine was tested and the CHRB alleges that it was found to contain Procaine in excess of 10 nanograms per millilitre (“ng/ml”). To the extent that a horse’s urine contains Procaine in excess of 10 ng/ml, it is a prohibited substance. The CHRB conducted an investigation, including a search of Appellant’s barn area, and filed and served a Complaint against Appellant dated June 7, 2001 (CHRB Ex. 1), which notified her to appear before the Board of Stewards (Stewards) on June 28, 2001.

2. The CHRB Complaint alleges three violations: Rule 1843¹ (drugs for a horse must be prescribed by a veterinarian and properly labeled; a prohibited substance may not be administered to a horse); Rule 1847 (“blocking” by administering an anesthetic in the leg of a horse entered in a race is prohibited); and Rule 1887(a) (trainer to insure the condition of the horse). The Stewards conducted several days of hearings on the record, at which the CHRB and Appellant were represented by counsel and offered evidence by testimony, documents and stipulation, and oral and written argument.

3. On September 28, 2001, the Stewards issued a written Statement of Decision and Rulings #167 and #168 (CHRB Ex. 7). In summary, the Stewards decided that it had not been proven that there was a violation of Rule 1847 for blocking a leg. Neither the Statement of Decision or Rulings #167 and #168 indicate any action taken against Appellant due to the presence in Appellant’s barn area of drug containers that did not have veterinarian prescription labels attached.

The Stewards concluded that the horse had been administered a prohibited substance for which Appellant was responsible. In Ruling #167 You Scare Me was disqualified from receiving purse money and the order of finish in the race was revised to remove the horse. In Ruling #168, the Stewards found that Appellant was responsible for the horse’s condition under Rule 1843(a), (b) and (d), and imposed a fine of \$1000 against Appellant under Rule 1887.

Appellant made a timely appeal of the Decision and Rulings.

Applicable Law

4. Several statutes² and regulations apply to these proceeding.

a. Section 19517(a) sets forth the CHRB’s authority on an appeal from a Stewards’ decision, and states:

“(a) The board, upon due consideration, may overrule any steward's decision other than a decision to disqualify a horse due to a foul or a riding or a driving infraction in a race, if a preponderance of the evidence indicates any of the following:

“(1) The steward mistakenly interpreted the law.

“(2) New evidence of a convincing nature is produced.

“(3) The best interests of racing and the state may be better served.”

¹ The CHRB Rules are found in Title 4 of the California Code of Regulations.

² All statutory references are to the Business and Professions Code and are designated by section numbers.

b. Medications and drugs are discussed in Rule 1843, which states:

“It shall be the intent of these rules to protect the integrity of horse racing, to guard the health of the horse, and to safeguard the interests of the public and the racing participants through the prohibition or control of all drugs, medications and drug substances foreign to the horse. In this context:

“(a) No horse participating in a race shall carry in its body any drug substance or its metabolites or analogues, foreign to the horse except as hereinafter expressly provided.

“(b) No drug substance shall be administered to a horse which is entered to compete in a race to be run in this State except for approved and authorized drug substances as provided in these rules.

“(c) No person other than a licensed veterinarian or animal health technician shall have in his/her possession any drug substance which can be administered to a horse, except such drug substance prescribed by a licensed veterinarian for a specific existing condition of a horse and which is properly labeled.

“(d) A finding by an official chemist that a test sample taken from a horse contains . . . a drug substance in excess of the limit established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse.”

c. Rule 1843.1 addresses prohibited drugs and states, in pertinent part:

“For purposes of this division, prohibited drug substance means:
* * *

“(b) any drug, substance, medication or chemical authorized by this article in excess of the authorized level or other restrictions as set forth in this article.”

d. Under Rule 1843.2, Class 3 drugs are those which have a major pharmacological effect on the cardiovascular, respiratory and/or autonomic nervous systems. Procaine is listed as a Class 3 drug.

e. Under Rule 1844, drugs authorized by the CHRB may be administered. Under subpart (e)(7), the official urine test sample may contain Procaine in an amount that does not exceed 10 ng/ml.

f. Rule 1847 defines “blocking” as “the administration of any local anesthetic, or other agent, to desensitize a portion of a leg either locally by infiltration of the tissues, regionally by administration directly over a nerve, or by injection directly into a joint space, tendon sheath, or bursa for the purpose of desensitization of a painful condition. These practices are prohibited after a horse is entered to race.”

g. Rule 1858 states, in pertinent part, that urine samples shall be taken from all race winners and from other finishers as designated by the Stewards.

h. Rule 1859 states the methods by which urine samples shall be collected and sent for testing. Under subpart (b): “If the official laboratory fails to detect in the official test samples, a prohibited drug substance, as defined in this article, the official sample shall be discarded immediately.”

i. Rule 1859.25 states, in pertinent part that, in addition to the official urine test sample, a “split sample” shall be preserved for further testing at the request of a trainer if the official test sample was found to contain a prohibited substance. Under subpart (d), the CHRB sends the split sample to the designated laboratory for testing, the following possible results:

“(1) If the findings by the independent Board-approved laboratory fail to confirm the findings of the prohibited drug substance as reported by the official laboratory, it shall be presumed that the prohibited drug substance was not present in the official sample.

“(2) If the findings by the independent Board-approved laboratory confirm the findings of the prohibited drug substance as reported by the official laboratory, the Executive Director shall report these findings to the Board within 24 hours after receiving confirmation of the prohibited drug substance in the split sample.”

j. A positive test can lead to disqualification under Rule 1859.5, which states:

“A finding by the stewards that an official test sample from a horse participating in any race contained a prohibited drug substance as defined in this article, which is determined to be in class levels 1-3 under Rule 1843.2 of this division, unless a split sample tested by the owner or trainer under Rule 1859.25 of this division fails to confirm the presence of the prohibited drug substance determined to be in class levels 1-3 shall require disqualification of the horse from the race in which it participated and forfeiture of any purse, award, prize or record for the race, and the horse shall be deemed unplaced in that race. Disqualification shall occur regardless of culpability for the condition of the horse.”

k. Rule 1887(a) states the trainer insurer rule.

“(a) The trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties, except as otherwise provided in this article. If the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of this division, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off. In addition, the owner of the horse, foreman in charge of the horse, groom, and any other person shown to have had the care or attendance of the horse, may be fined, his/her license suspended, revoked, or be ruled off.”

l. Rule 1888 states possible defenses to violations of Rule 1887:

“A trainer or other person charged with a violation of Rule 1887 of this division may defend, mitigate or appeal the charge if:

“(a) He was not, before the commencement of any proceeding against him, informed of the charges being brought against him;

“(b) He was not permitted counsel, representation or an advisor of his choosing in any hearing before the stewards concerning the charges;

“(c) He shows, by a preponderance of evidence, that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons; and

“(d) He was not permitted to introduce evidence in his own behalf before any finding or ruling was made against him. Nothing herein shall require that the stewards permit cross-examination of any witness appearing before them, or issue subpoenas for the attendance of witnesses.”

Test Results

5. After the race, the horse was selected for a urine test. The test, performed at Truesdail Laboratories, determined that the sample contained Procaine in amounts that exceeded the permitted level. More specifically, although Procaine is permitted up to 10 ng/ml, this test found Procaine at 38.87 ng/ml.

6. At Appellant's request, the split sample was tested by the Michigan Department of Agriculture, Laboratory Division, which first reported that its testing confirmed the first lab's finding of Procaine “at a level exceeding the authorized level as established” by the CHRB. The Michigan Lab later wrote that, although it does not normally do a “quantitation” on Procaine tests, it did so here, with two results of 11.3 ng/ml and 11.4 ng/ml.

Appellant's Responsibility for the Horse's Condition

7. Before coming to Southern California, You Scare Me had been housed out-of-state. The parties stipulated that You Scare Me was transported to Southern California and arrived on December 29, 2000, and that Appellant was the trainer for You Scare Me from arrival to the time of the race on February 4, 2001.

8. Appellant has raised numerous defenses, none of which absolve her of responsibility for the presence of a prohibited substance or establish that the Stewards' Decision and Rulings should be overruled. See Discussion section, below.

9. Appellant has not established, by a preponderance of the evidence, that: the Stewards mistakenly interpreted the law; new evidence of a convincing nature exists; or the best interests of racing and the state would be better served by a different outcome.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. Cause does not exist to overrule the Steward's Statement of Decision or Ruling #167 or Ruling #168, all dated September 28, 2001.

2. Cause exists to disqualify the horse You Scare Me and to fine Appellant, Laurie Burnett-Nutter, the sum of \$1,000, pursuant to Rules 1843(a), (b) and (d) and 1887, for the presence of Procaine in excess of the permitted levels in the horse You Scare Me in the ninth race at Los Alamitos Race Track on February 4, 2001.

Defenses

3. Appellant raises numerous defenses. Not all will be discussed herein. None of the defenses either eliminated or reduced Appellant's responsibility for the finding of a prohibited drug in the horse.

4. Appellant elicited evidence of many scenarios by which Procaine could have been purposefully administered by others or present due to accidental contamination. For example, Procaine could have been administered by the prior owner or the transporter before the horse was transported to Southern California to ward off infection or illness that might occur to a stressed horse while in transit. Or there could have been contamination from the horse identifier who, with the same pair of gloves, lifts the lip of each horse before the race to verify an identifying tattoo. Or there could have been some contamination in the testing barn where each horse has its own water buckets but it's been known that a horse will sometimes drink from another horse's bucket.

Other than the presence of Procaine as established by testing the official sample and the split sample, there was absolutely no evidence that any of these other possible scenarios had actually occurred.

Rules 1843, 1843.1, 1843.2 and 1844(e)(7), operating together, create the presumption that test results of more than 10 ng/ml of Procaine establish that the trainer has been negligent in the care of the horse and that the drug has been administered to the horse.³ The effect of this presumption, under Evidence Code section 604, is that the Administrative Court and the CHRB must assume the existence of the presumed fact “unless and until evidence is introduced which would support a finding of its nonexistence.”

Appellant’s evidence only established other possible scenarios, without proving that the Procaine actually came from any other source. Without such proof, the presumption establishes Appellant’s responsibility.

5. Appellant questions whether the Michigan Lab results of 11.3 and 11.4 ng/ml can “confirm” the Truesdail Lab result of 38.87 ng/ml.

First, Appellant contends the large disparity between the two labs’ measurements means Michigan Lab has not confirmed the Truesdail Lab. However, the applicable Rules do not require a confirmation of the actual quantity of a drug. Rather, the Rules work together as follows: Rules 1843(d), 1843.1 and 1843.2 establish that the presence of more than 10 ng/ml of Procaine is a prohibited substance; and Rule 1859.25(d)(1) and (2) concern the two alternatives if the split sample test does or does not “confirm the findings of the prohibited drug substance as reported” in the official sample. What is being “confirmed” is not the actual quantity of drug; rather, the second lab confirmed the first lab’s conclusion of the presence of a prohibited substance (Procaine in excess of 10 ng/ml). That each lab found the Procaine to exceed 10 ng/ml is significant; that the labs found different amounts of excess is not.

Appellant’s contention is not born out by the evidence. Specifically, Dr. Hester of Truesdail Labs submitted uncontroverted testimony explaining the possible reasons for the different quantities. For example, the split sample was older when tested and the drug may have degraded. Further, Truesdail Labs uses a procedure to prepare its test samples that separates the prohibited drug from other substances in the urine, perhaps resulting in a higher concentration than at Michigan Labs, where this type of sample preparation is not used.

Nor did Appellant undermine the Truesdail Labs’ results with evidence that the lab at the University of California at Davis uses an even more precise methodology in its testing regimen. Dr. Kollias-Baker from Davis testified that the Truesdail Labs technique was acceptable and would give accurate results.

³ Rule 1843(d) uses the concept of “prima facie evidence” which, under Evidence Code section 602, establishes a rebuttable presumption.

6. Appellant raises a host of issues relating to a request to issue subpoenas before the Stewards' hearing. Although she argues that she made three requests (Appellant Ex. 8, page 2, footnote 2), Appellant does not cite these instances in the record, and the only request in evidence is a letter dated July 18, 2001 from attorney Irwin to the Stewards or the CHRB (Appellant Ex. 2). This letter is not specific enough to constitute a request for issuance of a subpoena. The only reference to a subpoena is in the "Re" ("reference") line, which reads: "REQUEST FOR PRODUCTION OR SUBPOENA OF EVIDENCE FOR HEARING." (Emphasis in original.) The first line of the letter states a request that the documents listed below "be made available at my office at the above address for preparation regarding the hearing in this matter set for July 27, 2001."

Attorney Beckington replied on July 23 that, in essence, all evidence the CHRB had in its possession had already been served on Appellant, and that other requested items (race finish results and urine tests from later races) was in the possession of the race track. The record contains no mention of any other request by Appellant before the Stewards' hearing.

The July 17 letter is not a sufficient request for issuance of a subpoena. It does not state to whom or which entity the subpoena should be directed, and it is contradictory in referring to a subpoena "for hearing" and for production at an office for preparation prior to hearing.

Although Appellant raised the issue of the request for subpoenas at the Stewards' hearing (see transcript of July 26, 2001, CHRB Ex. 10, pages 14 through 22), counsel states that Appellant is ready to proceed. Counsel never established that the information he wanted to subpoena (i.e., later race results and later urine test results) was relevant or material to the proceedings.

7. Appellant contends that she cannot be liable for administration of Procaine when the horse was being transported, before she became the trainer and the insurer of the horse's condition. This argument fails for the same reason as in Conclusion 4, above—Appellant submitted no evidence that Procaine had been administered to the horse before it was in her care.

The interpretation urged by Appellant is contrary to the plain wording of the trainer insurer rule, Rule 1887(a), placing responsibility for the condition of the horse solely on the trainer "regardless of the acts of third parties."

8. Appellant did not prove any of the defenses permitted under Rule 1888, particularly subpart (c) allowing proof of making "every reasonable effort to protect the horses in his care from tampering by unauthorized personnel." Appellant introduced no evidence of any efforts made to protect horses from tampering. Nor did she introduce evidence of any efforts made to find out whether the horse had been administered any drugs for transport, or had any prohibited drugs in its system after arriving in state and before running the race.

9. Although Appellant raises numerous objections to the Stewards' proceedings, such as late production of the investigator's notes and some discussion between witnesses in between the days of the hearing, Appellant makes no offer of any resulting prejudice that would justify overruling the Stewards' Decision and Rulings. The same is true of Appellant's claim that due process rights were violated by a delay in lodging the full record below with the Office of Administrative Hearings.

10. Appellant challenges the authority of the Stewards to conduct the hearing.⁴ To summarize Appellant's arguments and point out their fallacies would take more time and effort than is called for under the entirety of the circumstances herein. (For example, a portion argues that the Stewards cannot revoke a license, when all that the Stewards here have ordered is a fine.) The arguments rely upon information not in evidence in the record in this matter (e.g., prior actions by Stewards in other cases; a "Horseman's Handbook"). In sum, the challenges to the Stewards' authority to conduct the hearing are denied.

11. Nowhere in the record or at the administrative hearing does Appellant address the amount of the fine imposed, \$1,000. There was no evidence or argument that the amount is not authorized by law or creates any hardship to Appellant or is unreasonable.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The appeal of Appellant, Laurie Burnett-Nutter, of the Board of Steward's Statement of Decision, Ruling #167 and Ruling #168, all dated September 28, 2001, is denied. The horse You Scare Me is disqualified from the race and Laurie Burnett-Nutter is fined the sum of \$1,000.

DATED: June 28, 2002.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

⁴ This argument is contained in the appendix to Appellant's Closing Brief (Appellant Ex. 8). The entire appendix was submitted in violation of the order of the Administrative Law Judge dated April 26, 2002, limiting the brief to 15 pages, which limit was imposed with the input and consent of Appellant's counsel.